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No. 98-404

IN THE

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES RICHARD A. GEPHARDT, DANNY K. DAVIS, JUANITA MILLENDER-McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE M. SLAUGHTER, and BENNIE G. THOMPSON SUPPORTING APPELLANTS

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STATEMENT

The issue in this case is whether the Census Act or the Constitution will be interpreted as requiring the Census Bureau to continue to use a methodology that will predictably fail to count a substantial percentage of the population -- most of whom will be members of minority groups with relatively low incomes. The House of Representatives has not contested the proposition that, absent use of statistical adjustment techniques, this differential "undercount" will occur in the 2000 Census, as it has in every census in recent memory. Nor has it denied, for

purposes of this litigation, that the proposed adjustment techniques will substantially improve the accuracy of the census. The House leadership's opposition to scientific "sampling" is instead based on the fact that it would prefer to retain a system that counts only a non-representative "sample" from which the poor and minorities are disparately excluded. As we show, however, Congress has never mandated retention of that system, and there is no reason to read the Constitution as barring methodologies that will produce a more accurate count of the entire population.

A. The Traditional Approach to Enumerating the Population, the "Undercount," and Previous Forms of Statistical Adjustment Designed to Improve the Accuracy of the Decennial Census

The decennial census, although sometimes denominated a "headcount," has never been a simple process of counting heads. In the very first census, in 1790, census officials relied on one member of each household to report the number of individuals in that household, rather than counting each individual themselves. *See infra*, p. 47. Since that time, census officials have adopted a variety of innovative techniques in an effort to compile accurate reports about the number of people living in each of the nation's households. Just one example is the evolution from a survey based on home visits to use of mailed out forms followed, where necessary, by visits. *See* Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress – The Plan for Census 2000,* JA 34, 46-47 (rev. Aug. 1997) (*"Report to Congress"*). Despite this tradition of innovation, however, in every decade, the Census Bureau has faced enormous problems in its efforts to locate all of the population and obtain accurate information about it.

First, the census must find out where people live, a process that inevitably leaves out millions who live in unknown dwellings, homes thought to be empty, or no home at all. *See*

id. at JA 73-74, 87, 104; *National Law Ctr. on Homelessness & Poverty v. Brown*, Civ. A. No. 92-2257-LFO, 1994 WL 521334 (D.D.C. Sept. 15, 1994). Once the census locates a dwelling, it must find out how many people live there. But the Census Bureau does not physically count individuals. Rather, it relies on a person to report (either in person or by mail) how many individuals live in a household. Even when that person is a member of the household, incorrect answers are frequent, in part because the census must determine each individual's "usual residence" on April 1 of a census year, which often does not correspond to the place where an individual actually is on that day. *See Franklin v. Massachusetts*, 505 U.S. 788, 804-06 (1992); *Borough of Bethel Park v. Stans*, 449 F.2d 575, 579-81 (3d Cir. 1971); *Report to Congress*, JA 106. The probability of error increases dramatically when the census is unable to contact anyone in a given dwelling and must seek information from a neighbor, building manager, or other "reliable" source. *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1121 (2d Cir. 1994), *rev'd on other grounds, sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996).[1/]

The result of these and other problems is the persistent "undercount." In the 1990 census, *15 million* people were not

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1/ In some instances, the Census Bureau simply stops trying to gather information about a household. In 1990, for example, when the Bureau had obtained data from about 95% of the occupied households in a given district, it made only one more attempt to contact the nonresponding households in that district. *City of New York*, 34 F.3d at 1121. That same year, the Bureau created a list of shelters and other sites frequented by homeless persons by mailing a letter to 39,000 local governments requesting the names of such sites. Although 14,200 local jurisdictions responded, the Bureau conducted an operation to count the homeless in only 5,050 of them, or roughly one-eighth of all localities contacted. *National Law Center on Homelessness*, 1994 WL 521334, at *1-*2. *See also Franklin*, 505 U.S. at 794 (discussing Census Bureau's limited attempt to include overseas federal employees in the census).

counted at all or were omitted from the data for the block where they resided (the gross undercount). Another *11 million* people were counted but should not have been, or were counted more than once, or were otherwise included in a block where they did not reside (the gross overcount). *Report to Congress*, JA 120. Thus, while the net undercount in 1990 was "only" 4 million people (15 million undercounts minus 11 million overcounts), the overall level of error was much larger.

The census is much more likely to miss some segments of the populace than others, and thus to overestimate the populations of some geographical areas while underestimating the populations of others. JS App. 3a-4a & n.2; *Wisconsin v. City of New York*, 517 U.S.1, 7 (1996). In 1990, for example, renters were missed far more frequently than homeowners. *See Report to Congress,* JA 49. Racial and ethnic minorities are also disproportionately undercounted. Compared to non-Hispanic whites, the undercount rate in 1990 was six times greater for African-Americans and seven times greater for Hispanic persons. *Id.* at JA 49. The error rate increased between 1980 and 1990, *id.* at JA 47-48; JS App. 3a, and the Census Bureau predicts that, unless it changes its methodology, the rate will increase even further in 2000, *Report to Congress*, JA 47-48, 51-52.[2/]

Using such flawed data to apportion representatives amounts to pretending that one non-representative sample of the population -- people who are counted by the census one or more times -- reflects the distribution of the whole population. *Id.*

2/ The root of the problem appears to be several large social trends, such as growth in mobility, in the number dual-worker families, and in alienation from society generally and government in particular. *Id.* at JA 51-52.

at JA 81.[3/] Thus, as the Census Bureau explained, "[T]he issue is not whether to 'sample' but whether to sample scientifically. . . . [I]nformation on less than the whole population has always been used to characterize the whole population." *Id.*

The Census Bureau has for years used statistical techniques in partial efforts to *reduce* the undercount. Since 1940, in cases where a residence is believed to be occupied but no information about its residents is obtainable, the Bureau has "imputed" that information based on the demographics of nearby households. *Report to Congress,* JA 81-82; Congressional Research Service, *The Decennial Census: an Analysis and Review, Report to the Subcomm. on Energy, Nuclear Proliferation and Federal Services,* 94th Cong., at 12-13 (Nov. 1980) ("*Decennial Census: an Analysis*"). In 1970, the Bureau went further, using sampling techniques to ascertain the number of people living in dwellings it had initially identified as vacant. Based on a sample survey, it adjusted the final census data by deeming 11.4% of all "vacant" units occupied, thereby adding more than one million people to the census. *See Report to Congress*, JA 82;

3/ This, in turn, can mean that some states are unfairly over- and under-represented in Congress. In addition, although not required to do so under any theory, the Census Bureau has in the past used the same unadjusted figures in fulfilling its obligation to provide data to the states so they may draw legislative districts. Using such data to draw congressional districts can produce districts within a single state that vary in size by as much as 8 percent. *See* John Mercurio, *Study: Minority Districts Undercounted*, Roll Call, Sept. 28, 1998.

Comptroller General, *Report to the House Committee on Post Office and Civil Service: Programs to Reduce the Decennial Census Undercount* 12 (May 5, 1976) ("*Decennial Census*").[4/]

B. Plans for the 2000 Census

For the 2000 Census, the Census Bureau plans to use more extensive statistical methods, based in part on the recommendations of three panels of the National Academy of Sciences. JS App. 5a; *Report to Congress*, JA 41-43, 53-55, 129-32. It will begin by attempting to collect census data through direct contact with *every* known household in the nation -- just as it has in the past. Nonetheless, despite several innovations designed to increase the response rate and accuracy of the mailed out census forms, *see* Report to Congress, JA 73-79, it is likely that 34 million households still will not respond, *id.* at JA 88.

As a result, following up with those who do not respond will be an enormous undertaking. To manage it, the Bureau intends to rely in part on sampling. It will personally contact sufficient households (randomly selected) to ensure that it has obtained responses from at least 90% of the households in each census tract. *Id.* at JA 88; JS App. 6a-7a. The characteristics of the households personally contacted will then be used to impute characteristics to the remaining households. *Report to Congress*, JA 92. This use of sampling, which is little different

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4/ Also in 1970, an additional 484,000 people were included in the census results based on a statistical survey of rural Southern areas where numerous addresses had been omitted from the Bureau's lists. *Decennial Census* at 12; Brief for Respondents, 1995 WL 731717, at *5, *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (Nos. 94-1614 et al.) ("Brief for Respondents") (summarizing trial record relating to census methods). The Census Bureau plans to repeat the Postal Vacancy Check in 2000, but for unexplained reasons, the "Postal Vacancy Check sampling plan is not at issue in this litigation." JS App. 6a.

in basic concept from the "imputation" used since 1940, not only will save substantial amounts of money but, by shortening the time required for the initial count, will improve the effectiveness of the next phase of the process -- the Integrated Coverage Measurement or "ICM" survey. *Id.* at JA 89-90.

In that phase, the Census Bureau will make an exhaustive effort to interview the 750,000 housing units located in a scientifically selected sample of 25,000 blocks. *Id.* at JA 93-94; J.S. App. 8a. The blocks will be selected to represent different demographic strata in each state. If there is a discrepancy between the data collected for a household during the original "headcount" and the ICM interview, a follow-up ICM interviewer will revisit the address to verify the true situation. These steps, resulting in very accurate data for the scientifically selected ICM sample, would be impossible to implement for every block in the nation. *Report to Congress*, JA 98.

Using the statistical methodology of Dual System Estimation (DSE), the Census Bureau will then compare the results of the ICM for the selected sample blocks with the results of the original "headcount" for those same blocks. *See Wisconsin*, 517 U.S. at 8-9 (briefly describing one version of the DSE process).[5/] By comparing these data, DSE can provide even more accurate results for these blocks than those provided by either of the prior counts. *Report to Congress*, JA 97.

Using the DSE results for the ICM sample blocks, the Census Bureau will then determine the error rate (or "estimation factor") in the initial "headcount" for individuals belonging to various demographic groups (called "poststrata"). *Id.* at JA 97.

5/ The Census Bureau has refined its scientific sampling methods since 1990 to increase their accuracy. *Report to Congress*, JA 94-96; Stephen Fienberg Decl. at ¶¶ 22, 33, 35 (filed May 4, 1998), JA 367, 371-73. For example, the strata in the 2000 census will not cross state lines. *Report to Congress*, JA 94, 96.

The estimation factors will then be applied to adjust the original population counts for each poststratum; these totals will be summed to obtain the total population of the state; and the state totals will be summed to arrive at the population of the nation. *Id.* at JA 97-98.

These scientific sampling procedures will result in population data much more accurate than that produced by the traditional census methods. *Id.* at JA 54-55, 120-23. Moreover, the census would cost $675 to $800 million more without sampling, despite its dramatically lower accuracy compared to the Bureau's planned approach. *Id.* at JA 107-12, 120-21.

The Bureau's scientific sampling methods are also more difficult to manipulate for political purposes than less scientific approaches. With any sample, whether obtained through an intrinsically biased "headcount" or by a scientific selection of a representative sample, some differences will exist between the characteristics of the sampled population and the larger group from which the sample was chosen. In a scientific sample, however, sampling error is readily measured based on the mathematics of probability. *Id.* at JA 117. In contrast, errors attributable to data collection for a non-scientific sample produce biases in the results that cannot be readily measured or mathematically controlled. *Id.* at JA 116-17. Because scientific sampling has known, objective properties, "experts agree that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it." *Id.* at JA 129.

C. Congress and Legislation Concerning "Sampling"

Congress first addressed the issue of "sampling" in the census in 1957, in the original version of 13 U.S.C. § 195. That provision authorized the Census Bureau to use "the statistical method known as 'sampling'" for all purposes "[e]xcept for the determination of population for purposes of apportionment of

Representatives in Congress among the several States." 13 U.S.C. § 195. At that time, the purpose was to authorize what had come to be known as the "long form" -- a lengthy set of supplemental questions that had been posed during the 1940 and 1950 decennial censuses only to a randomly selected "sample" of the population. Responding to a request from the Census Bureau for express authorization, Congress agreed that it would be more efficient and less costly to continue using the long form. *See* S. Rep. No. 85-698, (1957), *reprinted in* 1957 U.S.C.C.A.N. 1706, 1708 ("The proper use of sampling methods can result in substantial economies in census taking."); H.R. Rep. No. 85-1043, at 7 (1957) (same).

Thus, when Congress originally exempted apportionment from its authorization of sampling, it understood sampling to refer to a method, designed to promote efficiency rather than accuracy, in which information about a whole population was derived from a small survey as a "*substitute*[ ] for a full census." *See* H.R. Rep. No. 85-1043, at 7 (emphasis added). That is presumably why no one subsequently saw any conflict between the original section 195 and the use, for apportionment purposes, of sampling-based techniques like imputation or the 1970 postal vacancy check, designed to enhance the accuracy of a "full census."

In 1976, Congress amended section 195 to provide that "the Secretary *shall*, if he considers it feasible" use sampling. (Emphasis added.) The "except" clause remained the same. Congress also amended 13 U.S.C. § 141(a) to provide, without qualification, that the decennial census may "includ[e] the use of sampling procedures." As we show *infra*, the best interpretation of these amended sections is that they authorized the Census Bureau to use sampling for apportionment purposes. But there is little extrinsic evidence to confirm or rebut that interpretation. We do know that key members of Congress, including key supporters of the 1976 Amendments, were

simultaneously expressing concern about the undercount and pushing the Bureau to develop statistical techniques for eliminating it, hopefully for use in the 1980 Census. *See infra* p. 32. Logic suggests that they may have recognized the potential tension between these reforms and the existing version of section 195, and set out to ameliorate the problem by clarifying that section 195 did not prohibit such accuracy-enhancing techniques. In so doing, they would have been acting consistently with a longstanding and non-controversial trend of Congress giving more and more discretion to the Census Bureau to adopt methods to increase the accuracy of the census. *See infra* note 21.

As we discuss *infra*, the district court in this case took a different view -- that the absence of controversy in 1976 means that members of Congress did not understand the amendments to change the prior law concerning "sampling" and apportionment. But even assuming that was true, it does not mean those members ever had an understanding that the law barred sampling-based techniques designed to *improve* the *accuracy* of a full count. They may well have assumed that "sampling," in 1976 as in 1957, referred only to a technique of surveying a small "sample" deemed to represent the entire population. As in 1957, there is absolutely no indication in the legislative history of the 1976 Amendments that Congress was opposed to use of statistical adjustments to improve the accuracy of a full count.

D. Proceedings Below

This suit was brought by the Speaker of the House of Representatives, suing in the name of the entire House pursuant to a special jurisdictional statute, section 209 of the 1998

Appropriations Act.[6/] The House sought to enjoin the defendant executive officials and agencies from employing statistical sampling in taking the census for the purpose of apportioning seats in the House of Representatives. It did not allege that statistical sampling will render the census less accurate as a measure of the *actual* number and distribution of people in the United States. This case thus presents a pure question of law: whether the Constitution or the Census Act forbids the use of sampling, regardless of its accuracy, for reapportionment purposes.

The district court ruled in favor of the House, relying on the Census Act without reaching the constitutional issue. It held that section 195 of the Census Act prohibits sampling, and that this section trumps the apparent authorization of sampling in section 141 of the Act. Because the district court was wrong, and because the Constitution also does not proscribe the methodology the Census Bureau intends to use in the 2000 Census, this Court should reverse.

SUMMARY OF ARGUMENT

1. This district court's ruling presents a textbook example of statutory interpretation emphasizing everything but the language of the two relevant statutory provisions, 13 U.S.C. §§ 141(a) and 195. Read *together*, as this Court's precedents require, these sections plainly authorize the Census Bureau to use sampling-based techniques in conducting all aspects of the decennial census. As the district court recognized, section 141(a) says so on its face. And section 195 does not take this authorization back. Section 195 *mandates* the use of sampling

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6/ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2482-83 (1997). Under § 209(g) of this Act, the Speaker or his designee may commence a civil action "for and on behalf of the House" to prevent the use of sampling.

by the Census Bureau if feasible, and then exempts counts used for congressional apportionment from that mandate. But an exception from a mandate does not ordinarily constitute a prohibition. Even the district court acknowledges that such a structure is ambiguous. That being so, there is no justification for reading section 195 as creating an exception to the authorization of sampling simultaneously established in section 141.

The district court based its interpretation on two principles of statutory interpretation supposedly designed to uncover and vindicate legislative intent not reflected in the plain language of the Act. But it makes no sense to erect a rebuttable presumption that a statutory amendment did not change the meaning of that very statute. Nor does it make sense to abandon the best reading of the words Congress chose to use, based on an intuition that Congress would have spoken with more clarity, or confirmed its intent in legislative history, if it had meant to make a change in the law. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

Even assuming the district court was right to abandon textual analysis for inferences about what Congress must have "meant," its intuitions were based on anachronistic assessments of what would have seemed important or controversial in 1976, as well as of how the statutory change would have been understood at that time. First, there is little reason to believe that amendments authorizing sampling for apportionment would have been viewed as the partisan issue they have since become. Congress had a long history of supporting changes in the census designed to improve accuracy, including sampling-based methods -- such as "imputation," and the "postal vacancy check" -- that were already in use. In 1976, the same House oversight committee that reported out the 1976 Amendments held a hearing on the undercount, at which members strongly

pressed the Census Bureau to develop and implement statistical adjustment techniques. It is reasonable to infer that the 1976 Amendments were designed to eliminate any (inadvertent) prohibition on the use of such techniques that existed in the prior law. Indeed, a year later, the same House members most involved in census matters introduced a bill to require the use of statistical adjustment techniques in the 1980 census -- a bill that contained no provision altering section 195, with its supposed prohibition of that practice.

Moreover, even if members of Congress did not understand in 1976 that they were changing the law with respect to "sampling" and apportionment, that does not mean that they intended to leave in place an existing ban on statistical adjustments of full counts. When, in 1957, Congress exempted apportionment from the authorization to use sampling, it did not understand "sampling" to include such adjustments; at that time, the sole issue was the extent to which the Bureau could survey the population by posing questions to a representative subset or "sample." Nothing in the 1976 legislative history indicates an intent to *expand* any existing prohibition on "sampling" to encompass statistical adjustments Congress had never set out to prohibit in the first place. Thus, if the Court is going to leave behind the plain text and embark on an analysis of what Congress "would have wanted," it would be a curious outcome to end up reading the Act as prohibiting something that -- as far as the legislative history is concerned -- was never even at issue.

2. The Court also should not be deterred from the best reading of the Census Act by any concern that the Census Bureau's planned methodology for conducting the 2000 Census is unconstitutional. That methodology constitutes an "actual Enumeration" within the meaning of Article I, Section 2, because it is a reasonably accurate method of numbering the population. This was the ordinary meaning of actual Enumeration at the time the Constitution was written, as is

strongly emphasized by the close linkage of the phrase with the textual requirement of apportionment according to the states' "respective numbers." The fact that the Constitution allows selection of any reasonably accurate method of conducting the census is further underscored by the textual prescription that the enumeration shall occur "*in such Manner as they [i.e., Congress] shall by Law direct*," which this Court has explained "vests Congress with virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 17, 19 (emphasis added).

In addition to the constitutional text, the Framers' debates at the constitutional convention, other contemporaneous records, and the emergence of the phrase "actual Enumeration" during the convention demonstrate that the Constitution does not mandate use of a headcount. The Framers' core purpose in Article I, Section 2 was to ensure the equal representation of equal numbers of people. *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964). They used the broad language "actual Enumeration" to enable Congress to fulfill that core purpose by choosing an accurate method, not to undercut that core purpose by requiring use of a headcount even if it could not accurately ascertain the number of people. In fact, prior to its submission to the Committee of Style the Constitution simply required that population "number[s] shall . . . be taken in such manner as the . . . Legislature shall direct," and that Committee did not intend to alter the meaning of the text in using the phrase actual Enumeration. 2 *The Records of the Federal Convention of 1787* 182-83 (Max Farrand ed. Yale 1966) ("Farrand") (report of Committee of Detail). Thus, the Constitution does not prescribe a particular method of conducting the census; it confers discretion on Congress to choose an accurate method. Indeed, in exercising that discretion from 1790 forward, Congress has never required census officials to conduct a pure headcount.

ARGUMENT

I. The Census Bureau's Planned Methodology Is Permissible Under the Census Act

The district court's conclusion -- that Congress in the 1976 Amendments precluded use of sampling techniques designed to make the decennial census more accurate and fair -- is fundamentally erroneous. Although purporting to rely at least in part on the "plain text" of the relevant provisions, the court did not and could not do so, because the relevant provisions of the Act, read together, show that Congress *authorized* the use of sampling techniques even for purposes of apportionment. To avoid that conclusion, the district court relied primarily on two principles of statutory interpretation: (1) that a statutory amendment should be presumed not to have changed "settled law," and (2) that when the best interpretation of a statutory amendment would effect a policy change that a court views as highly important or "sensitive," the court should reject that interpretation if Congress did not speak with crystalline clarity or confirm its intent in explicit legislative history.[7/] These principles are of dubious validity on their face. Moreover, even if valid in some circumstances, neither was appropriately applied in this case.

7/ The district court also gave brief mention to the doctrine that statutes should, where reasonably possible, be construed so as to avoid a constitutional issue. J.S. App. 64a. But as we show *infra*, there is no serious constitutional argument here, and the statutory analysis accordingly should not be skewed by an effort to avoid reaching the constitutional issue. *See Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998) (doctrine of constitutional avoidance need not apply "where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional"). The doctrine of constitutional avoidance also is inapplicable where, as here, a law is not "genuinely susceptible to two constructions after, and not before, its complexities [have been] unraveled." *Id.*; *see Salinas v. United States*, 118 S. Ct. 469, 475 (1998).

A. The Plain Meaning of the Two Relevant Provisions of the Act Is that the Census Bureau Is Authorized to Use Sampling to Make the Decennial Enumeration More Accurate.

The district court recognized that "interpretation of two provisions of the Census Act, sections 141(a) and 195, is ultimately determinative as to whether statistical adjustment to the initial headcount is permissible or proscribed." J.S. App. 46a. But it proceeded with a statutory analysis that did not fairly and fully consider both of those provisions. The court analyzed a whole variety of factors -- the pre-1976 law, the text of section 195 (which it conceded to be ambiguous), presumptions against changes in "settled law," and even the legislative history of the 1976 Amendments, *see* J.S. App. 48a-59a -- *before* it once again made reference to section 141(a). This allowed the court to discount the significance of a provision that, according to the court itself, "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. 61a. Such an approach can only be described as one designed to obscure, rather than illuminate, the plain meaning of the two provisions Congress enacted.

In 1976, Congress enacted a revised version of section 141(a), the primary provision authorizing the decennial census, adding for the first time a reference to sampling:

> The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures* and special surveys.

13 U.S.C. § 141(a) (emphasis added). Thus, as amended, the section explicitly authorizes, without exception, the use of

sampling in the decennial census. Section 195, as amended, provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (emphasis added). This section thus requires use of sampling wherever feasible, and then exempts the "determination of population for purposes of apportionment" from that requirement.

The district court read section 195 as a prohibition of sampling for apportionment purposes and then gave controlling weight to that section, on the theory that it is more "specific." J.S. App. 61a. But that proposition is itself debatable[8/] and, in any event, it is a court's duty, where reasonably possible, to read statutory provisions as harmonious rather than reading one provision as creating a gaping exception in another. *See, e.g.*, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) (interpreting two statutory sections based on "the familiar rule of construction that, *where possible*, provisions of a statute should be read so as not to create a conflict," *prior* to reaching the question of whether one statutory section was more specific) (emphasis added); *Rake v. Wade*, 508 U.S. 464, 471 (1993) (construing two statutory provisions to avoid the need

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8/ Section 141(a) is itself extremely specific. It applies only to the decennial census, the core purpose of which is to gather data for purposes of apportionment, and it specifically authorizes use of sampling in that census. Section 195, by contrast, applies to sampling in all of the activities of the Census Bureau, not just the decennial census. This case thus bears little resemblance to those cited by the district court, J.S. App. 61a, in which a very general authorization clause was trumped by a specific exemption from that clause.

to read an exception into blanket statutory language and explaining that "[w]e generally avoid construing one provision in a statute so as to suspend or supersede another provision"); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each").

Here, there is no great mystery about how to harmonize sections 141(a) and 195. Section 141(a) authorizes sampling in connection with the decennial census. Section 195 requires sampling, where feasible, except with respect to apportionment. Taken together, these provisions are fairly read as *authorizing* the Bureau to use sampling to adjust the decennial enumeration for apportionment purposes, while *requiring* the Bureau, wherever feasible, to use sampling in all other contexts. *See City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980). Thus, the district court posited a false conflict in deciding that section 195 carves out an exception to the authorization of sampling for the decennial census in section 141(a). It is "dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation," *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Sturges v. Crowinshield*, 4 Wheat 122, 202 (1819)), and there certainly is no reason to adopt such an approach here. *See also Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 115 (1991) (refusing to read exception into very broad statute despite arguments based on prior statute, legislative silence, and potentially conflicting statutory provisions).

To the contrary, the harmonized reading of sections 141(a) and 195 has much to recommend it. First, it is the most consistent with the text of section 141. As we have noted, the section expressly authorizes use of sampling, without exception, in the decennial census. Given the fact that the primary function

of the decennial census has always been to determine the population for purposes of congressional apportionment,[9/] this would have been a particularly odd way for Congress to express its intent to authorize sampling only for other purposes. Indeed, section 141(b) reinforces the linkage between the authorization of sampling and apportionment. It explains that the tabulation of population "required for the apportionment of Representatives" is the tabulation performed "under subsection (a) of this section" -- i.e., the tabulation for which sampling is explicitly authorized. 13 U.S.C. § 141(b).[10/]

The district court thus has good reason for concluding that section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. 61a. Moreover, the 1976 Senate Report confirms that understanding. It states that "[n]ew language is added at the end of the subsection to encourage the use of sampling . . . in the taking

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9/ *See* J.S. App. 53a ("The apportionment function is, after all, the 'constitutional purpose of the decennial enumeration.'") (quoting 1998 Appropriations Act § 209(a)(2), 111 Stat. 2440, 2481).

10/ The House argued below that the reference to sampling in 141(a) was added only to make the subsection parallel with new section 141(d), which for the first time authorized a mid-decade census and which contains the same language authorizing sampling. In fact, however, precisely the opposite is true. The bill as first passed by the House in April 1976 authorized sampling for the decennial census but contained no reference to sampling in the mid-decade census. *See* 122 Cong. Rec. 9797 (1976) (§§ 141(a) and 141(c)). The sampling language was added to section 141(d) by the Senate, after the Commerce Department suggested that doing so would preclude any inference of an "intent to make the mid-decade censuses different from the decennial censuses in this regard." *Mid-Decade Census Legislation: Hearing on S.3688 and H.R. 11337 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Statistics*, 94th Cong., 25 (1976) (Letter from General Counsel of the Commerce Dept. to Chairman McGee, commenting on the House bill); *see* H. Conf. Rep. No. 94-1719, at 11, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5479.

of the decennial census." S. Rep. No. 94-1256, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466. Two sentences later, it explains that "[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population." *Id.* at 5467.[11/] Here again, the linkage between the new authorization of sampling and apportionment could hardly have been missed.

Nor does the language of section 195 require a narrower interpretation. To reach that conclusion, one would have to read the "except" clause in section 195 as *prohibiting* use of sampling "for purposes of apportionment of Representatives in Congress." On its face, however, the "except" clause is simply an exception to a mandate imposed on the Bureau by the rest of section 195.[12/] And the district court correctly acknowledged that an exception to a mandate often simply serves to preserve *discretion*. The court cited examples of statutes "in which an exception from a mandate . . . does not constitute a prohibition in the area covered by the exception." J.S. App. 51a; *see id.* at 52a ("defendants' interpretation of the except/shall sentence structure is proper in some instances").

In fact, that is the *ordinary* meaning of the except/shall sentence structure present in section 195. Several examples

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11/ As the district court acknowledged, the Conference Report on the 1976 Amendments also expressly notes the addition of a reference to use of sampling in section 141(a), without suggesting any limitation on this authorization. J.S. App. 62a-63a (citing H. Conf. Rep. No. 94-1719 at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5479).

12/ The statute provides that the Secretary "shall, if he considers it feasible" authorize the use of sampling. This is the language of a mandate. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'The language of command'.") (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (referring to "the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion").

suffice to show this: 1) A rule that, "except for federal holidays, all law clerks must report to work Monday through Friday" (which leaves the clerks discretion as to whether to report to work on federal holidays); 2) A sign saying that "except for trucks under 10 feet tall, all trucks must take the next exit" (which leaves trucks under 10 feet tall the discretion as to whether to exit); and 3) A rule that "except for students participating in varsity athletics, all students shall take at least one physical education class" (which leaves varsity athletes discretion as to whether to take a physical education class).

To be sure, as the district court went on to note, an exception to a mandate in common parlance sometimes conveys, indirectly, a prohibitory intent, because common sense tells us in some settings that there would be no other reason for the speaker to carve out the exception. Thus, a direction to a servant to take all the articles of clothing in a closet to the cleaners, except one specific item, would usually be interpreted as an indication that the speaker did not want that item taken to the cleaners.[13/] But here, common sense suggests there were perfectly logical reasons why Congress would have created an exception from a mandate for the purpose of leaving the Census Bureau discretion about whether and when to use sampling for apportionment purposes. As noted *infra*, Congress in 1976 was aware that the Bureau was working on, but had not yet perfected, sampling-based techniques for improving the accuracy of the decennial enumeration. It might very well have decided to leave to the "experts" the judgment call about when those techniques were ready to be deployed.

13/ Although appellee and the district court have for some reason focused a great deal of attention on wedding dresses, the nature of the excepted item of clothing is not vital. The same common sense inference is justified if a speaker tells a servant to "take everything to the cleaners except my grey slacks."

More fundamentally, it is doubtful that it is *ever* appropriate to read a prohibition into a *statute*, when all that the legislature has done is to create an exception to a mandate. There is little reason to think that a legislative body, deliberately setting out to prohibit something, would do so in that way, *because that is not what the words say*. Indeed, neither appellee nor the district court was able to cite a single example of a statute in which Congress prohibited conduct by excepting it from a mandate. To be sure, there may be cases where the "except" clause reflects an understanding that a prohibition is contained in some other provision. But where that is not true, it should be a rare case, if any, in which a court infers an intent to create a new prohibition through enactment of an exception to a mandate.

Here, moreover, the most significant indicator of legislative intent points the other way. At the same time it was passing the revised section 195, Congress passed section 141(a), which on its face authorizes sampling for all purposes in the decennial census. It hardly makes sense that Congress would have relied on a court to read the "except" clause in section 195 as a limitation on section 141(a). [14/]

There is also a final problem with the district court's notion that section 195 prohibits the use of sampling-based techniques to adjust the census for apportionment purposes. Contrary to the view of the district court, in enacting the except clause in section 195, Congress clearly was *not* aiming to preserve use of a "traditional" headcount as the sole acceptable method of conducting the census. This is evident from the grant of

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14/ Thus, for example, a command to a servant to "clean every surface in the kitchen, except the windows, by the end of each day" might on its own be interpreted as reflecting a desire that the windows be left alone. But that interpretation would be precluded if the homeowner *simultaneously* told the servant to use his or her own best judgment about undertaking any window cleaning tasks that needed to be done in the house.

discretion in section 141, which, under any theory, provides the Census Bureau discretion to adjust the census using any techniques that do not involve sampling, such as use of birth and death statistics. Indeed, the possibility of adjustment based on birth and death statistics was discussed favorably in congressional hearings in 1976 prior to enactment of amended section 141(a). *See 1980 Census: Hearing Before the Subcomm. on Census and Population*, on the House Comm. on Post Office and Civil Service, 94th Cong., 5-7, 15, 18-19, 29-30 (June 1-2, 1976). Since section 141 allows the Bureau discretion to deviate from a headcount, the except clause in section 195 must have a purpose other than preserving a "traditional headcount." It is extremely implausible that a statute that allows the use of radical demographic techniques such as adjustment based on birth and death statistics would simultaneously prohibit the use of carefully designed sampling techniques that involve exhaustive canvassing of actual households.

For all of these reasons, sections 141 and 195 are best read as authorizing the Census Bureau to use sampling for apportionment purposes. That should be the end of the matter.

B. The District Court Erred in Principle in Basing Its Analysis on Such Factors as the Presumption that Amendments to a Statute Did Not Change the "Settled Law" and Congress's Failure to Express Its Intentions with Glaring Clarity in the Statute and the Legislative History.

Instead of interpreting the text of the statute enacted by Congress, the district court applied two non-textual principles of statutory interpretation reflecting its pre-existing intuition that Congress could not have meant what it said. That was a plain error. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's

meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Indeed, it is not a court's task "to enter the minds of Members of Congress -- who need have nothing in mind in order for their votes to be both lawful and effective -- but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

Moreover, there could be no clearer example of the hazards associated with replacing analysis of what Congress said with speculation about what Congress must have "meant." The particular principles of statutory interpretation offered by the district court have little or no legitimacy. And even assuming those principles were valid, the district court's entire analysis of legislative intent, centered on its conclusion that the 1976 Amendments as interpreted by defendants and intervenors amounted to a "momentous" change, reflects a failure to understand how a member of Congress would have perceived the matter in 1976.

1. The District Court Erred in Saddling Defendants with the "Burden" to Show that Congress Changed "Settled Law."

The district court began with the assertion that the Census Act, until 1976, plainly prohibited use of sampling for apportionment purposes, and it then pronounced that defendants bore the burden of showing that the 1976 Amendments changed this "settled law." J.S. App. 49a, 59a. It thus addressed the question of statutory interpretation with a thumb on the scales favoring the view that Congress did not alter its position on sampling as applied to apportionment. But it makes no sense, as a general matter, to apply a presumption that a statutory amendment was intended to have no substantive effect. Indeed, the presumption ought to be the opposite. "When Congress acts

to amend a statute, we presume that it intends its amendment to have real and substantial effect." *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397 (1995).

The sole case cited by the district court in support of its presumption against change of meaning -- *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) -- is utterly inapposite. It involved interpretation of one of the Federal Rules of Evidence, which replaced and largely codified the common law of evidence. In that context, the Court applied a presumption that the common law rule was left untouched by Congress. But there would be no reason to apply the same kind of presumption where the *language* of a federal *statute* has been deliberately changed.[15/]

Here, the district court and appellee do suggest that the changes to section 195 altered the law by "strengthen[ing] the call for sampling in non-apportionment information gathering." J.S. App. 54a. But they have no theory about why Congress simultaneously added an express authorization of sampling in the decennial census *in section 141(a)*. After all, sampling, for non-apportionment purposes, was already fully authorized both under the 1957 version of section 195 and under its 1976 replacement. The *only* logical reason to add an authorization

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15/ The same line of argument demonstrates that this case does not involve a suspect repeal by implication as the district court suggests. J.S. App. 55a. No one claims that the 1976 Amendments repealed some other statutory provision that Congress did not discuss. Here, Congress not only mentioned the statutory provision that it was "repealing," but it was that very provision – section 195 – that was the subject of the statutory amendment at issue. *Cf. Galvan v. Hess Oil Virgin Islands Corp.*, 549 F.2d 281, 288 (3d Cir. 1977) ("*If the legislature has not directly amended a statute*, it is only in the rarest case that a court should rule the statute amended.") (emphasis added).

in section 141(a) was to allow sampling for apportionment purposes.[16/]

2. The District Court Also Erred in Demanding Exceptional Clarity of Draftsmanship, or Confirmation in the Legislative History, Before It Would Follow the Plain Meaning of the Words of the Statute.

The district court gave even greater weight to its intuitive assessment that Congress would have viewed allowing sampling for purposes of apportionment as "dramatic" and "momentous," and that Congress thus would not have effected such a change (1) through "oblique," "indirect" and "subtle shifts of language" and (2) without confirming that intent in legislative history. J.S. App. 53a-59a. Here again, however, the court was on very shaky ground.

Thus, as to the question whether the statute is too "oblique" to effect a significant policy change, there is no legal or logical basis for rejecting the interpretation best supported by the terms of a statute, in a case involving a matter of substantial public import, on the theory that Congress would have been even

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16/ In the district court, appellee contended that, even under defendants' theory, the authorization of sampling in the new mid-decade census in section 141(d) is wholly redundant in light of section 195, because the mid-decade census cannot be used for apportionment. It posited that the sampling language in section 141(a) was copied from section 141(d) and is therefore likely to be equally superfluous. In fact, however, the reference to sampling was inserted first in section 141(a), and was only added to section 141(d) later in the legislative process. *See* note 10 *supra*. Thus, there is every reason to give substantive significance to Congress's initial decision to add a reference to sampling to section 141(a). *See id.*

clearer if it had really meant what it said.[17/] Indeed, it is at least as plausible to apply the opposite principle -- *i.e.*, to adhere *more* closely to the rule that plain meaning controls statutory interpretation in cases where Congress would have considered the issue important. After all, it is precisely in such a situation that members of Congress are most likely to have paid attention to the precise terms of the proposed legislation being passed.

Equally insupportable was the district court's reliance on the absence from the legislative history in 1976 of a "clarion call announcing a fundamental change in the conduct of the only constitutional aspect of the census." J.S. App. 62a. As this Court explained in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980),

> it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

See also Sedima SPRL v. Imrex Co., 473 U.S. 479, 495-96 n.13 (1985) ("Congressional silence, no matter how 'clanging,'

17/ Nor is there any basis for imposition of some sort of "clear statement" rule here on the theory that the census and apportionment are a "traditionally sensitive area." *See* J.S. App. 571. This Court has in some instances required Congress to convey its purpose clearly when it intends to encroach on areas that were traditionally *the domain of the states*, *see United States v. Bass*, 404 U.S. 336, 349 (1971), but this case involves no comparable invasion of the prerogatives of another level of government. Indeed, a congressional decision to provide the Census Bureau the discretion to use sampling for apportionment reduces Congress' *own* power, not the power of a different institutional body. Moreover, even in the federal/state context, the plain statement requirement "does not warrant a departure from the statute's terms." *Salinas*, 118 S. Ct. at 475.

cannot override the words of the statute."); *Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

The district court did cite one case in which this Court relied on the absence of explicit reference to a particular topic in legislative history as some evidence of the meaning of a statute -- *Chisom v. Roemer*, 501 U.S. 380 (1991). *Chisom*, however, is distinguishable because, unlike there, the statutory language at issue here provides a relatively clear answer about what Congress intended. A more pertinent ruling came a year after *Chisom*, when the Court stated:

> The dissent believes petitioner's position on this point to be supported by the history and structure of the ADA (sources it deems 'more illuminating' than a 'narrow focus' on the ADA's language), because the old regime did not pre-empt the state laws involved here and the ADA's legislative history contains no statements specifically addressed to state regulation of advertising. Suffice it to say that *legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning*.

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 n.2 (1992) (citations omitted) (emphasis added). [18/]

18/ The *Chisom* dissent aptly summarizes the flaws in the district court's opinion in this case:

> Today, . . . the Court adopts a method quite out of accord with th[e] usual practice. *It begins not with what the statute says, but with an expectation about what the statute must mean absent particular phenomena . . . and the Court then interprets the words of the statute to fulfill its expectation. . . .* As method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it.

501 U.S. at 405 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.) (citation omitted) (emphasis added).

3. The District Court's Inferences Were Based on a Misunderstanding of History.

Even if the Court were inclined to alter its approach to interpreting statutes -- and rely, like the district court, on an intuition that Congress could not have meant what it said -- this would be an inappropriate case in which to do so. If a court is going to replace textual analysis with legislative psychoanalysis, it must at a minimum have a clear and complete understanding of how members of Congress would have understood what they were doing. In this case, the premises of the district court's inference-based analysis -- that allowing sampling in connection with apportionment would have been perceived as altering "settled law" in a "momentous" way -- reflect assumptions about how Congress would have viewed the matter in 1976 that are at best highly questionable.

a. First, to the extent that members of Congress understood the 1976 Amendments as changing the law to authorize "sampling" for apportionment purposes, it cannot be assumed that this would have been viewed as a matter of huge importance. The logical explanation of this change is that Congress (1) had come to understand that the original version of section 195 stood as a potential barrier to the Census Bureau's implementation of statistical adjustment techniques to make the census more accurate, and (2) chose to deal with this problem by giving the Bureau discretion. This, in turn, would not have seemed like a radical change in 1976. First, contrary to the assumption of the district court, Congress was not legislating against a 200-year background understanding that

using statistical techniques to adjust the census was improper. Indeed, statistical sampling as a probability method did not exist until the late 19th century and did not begin to be perfected and applied to problems of census taking until the 1930s (Margo Anderson Decl. ¶¶ 11, 16(a),(b) (filed May 2, 1998), JA 347, 350-51; Fienberg Decl. ¶ 42, JA 337-78. Moreover, statistical techniques that could hope to eliminate the undercount in the decennial census did not begin to develop until the 1970s. Anderson Decl. ¶¶ 14-15, JA 349-50; *Decennial Census* at 21.[19/]

By that time, as discussed above, Congress was well aware of the Census Bureau's use of certain more limited statistical techniques -- "imputation," used since 1940, and the 1970 postal vacancy check and related adjustments -- to add individuals to the census who had been missed in the initial counts. See *supra* p. 5. But Congress never questioned the practice of imputing residents to occupied dwellings based on the demographic characteristics of their neighbors. And, after 1970, far from disapproving of that year's more extensive use of statistical techniques to add people to census counts, Congress issued a report summarizing the programs, explained that it was "most

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19/ As we note *infra*, the form of "sampling" Congress dealt with in 1957 was the "long form," which the Bureau distributes to only a small sample of the population. But by 1976 Congress had been presented with forms of "sampling" designed to supplement a headcount to make it more accurate. See *infra*. It would have been logical for Congress to recognize this change simply by authorizing the Census Bureau to use "sampling" for apportionment in 1976. In so doing, members would have had every reason to expect the Census Bureau to use sampling methods aimed at increased accuracy, not those, such as the long form, that would plainly decrease accuracy. The Census Bureau had never given any indication it was even considering use of long-form-type sampling for apportionment purposes, and the Bureau would, in any case, have been precluded from use of such a method by the constitutional requirement of reasonable accuracy. *Wisconsin*, 517 U.S. at 20.

impressed" with their effectiveness, and suggested the Census Bureau request additional funds to extend them. H.R. Rep. No. 91-1777, at 22, 41, 43 (1970).[20/]

Congress's implicit and explicit approval of these kinds of measures aimed at reducing undercounting was consistent with a long tradition of acceptance of innovations designed to improve accuracy -- including, for example, machine tabulation of the census and adoption of a mail-out census. Anderson Decl. ¶¶ 4, 5, 8-10, 13, JA 342-43, 345-47, 349; *Report to Congress* at JA 46-47. This tradition suggests that more systematic statistical adjustments of the kind currently proposed would not have been met with reflexive opposition -- at least until, as occurred more recently, the partisan advantages of maintaining an undercount came to be understood and valued by those who stood to gain.[21/]

20/ In 1976, the Senate Report then stated that the 1976 Amendments made "numerous technical changes throughout title 13, United States Code, *to conform more properly and closely to the current language and practices used by the Bureau of the Census*." S. Rep. No. 94-1256, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5464 (emphasis added). *See also Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980) ("There is nothing contained in 13 U.S.C. § 195, as amended, which would suggest that the Congress was interested in terminating the Census Bureau's practice, manifested in the 1970 census, of adjusting the census returns to account for people who were not enumerated."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981).

21/ Congress's decision to grant discretion to the Census Bureau to use sampling in connection with apportionment is also consistent with a second historical trend. Congress has gradually ceded control over the census to the Bureau to the point where the present Census Act contains almost none of the details of the early Acts. Congress first created the Bureau of the Census in 1902 as a permanent federal agency. Margo J. Anderson, *The American Census: A Social History* 83 (1988). In the 1930 census, Congress provided the Census Bureau the authority to determine what questions would be asked as part of the census. *See id.* at 159; *Decennial Census: an Analysis* at 3. In 1957, Congress provided the Bureau discretion to use sampling outside

In fact, in 1976, while the bill amending sections 141 and 195 was pending in Congress, the House Subcommittee on Census and Population held hearings to discuss the newly recognized problem of the undercount. Members expressed grave concern about the undercount and urged the Census Bureau to find and implement ways to eliminate it. *1980 Census*, *supra*, at 1-2, 5-7, 15, 18-20, 29. The Bureau said it was working on the problem and might or might not have appropriate techniques available for the 1980 census. *See id.* at 19-20, 29. These included several statistical methods, among which was a version of dual system estimation with many similarities to the Census Bureau's current plans.[22/] The discussion during the hearings centered around the feasibility of making these new methods sufficiently accurate to use in the 1980 census. No member of Congress expressed any concern that use of such methods, if accurate, was somehow inherently suspect.[23/]

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the apportionment context. In 1964, Congress conferred on the Census Bureau the discretion to use a mail out census by repealing the existing requirement that enumerators visit each household. *See* Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 (1964); S. Rep. No. 88-1474 (1964), *reprinted in* 1964 U.S.S.C.A.N. 3308, 3308-09. As a result, the Census Bureau was left with discretion over almost all of the aspects of the census that had been specifically controlled by Congress in early Census Acts. The 1976 Act was simply one more step in the same direction.

22/ *See id.* at 5 (describing proposed method of dual systems estimation as involving "matching a sample of persons from an independent list" to determine the portion enumerated in the headcount and then adjusting the enumeration accordingly); *Decennial Census* at 21 (report considered by Congress in 1976 hearings describing proposed dual system estimation as using a "sample of persons").

23/ *See* Letter from Stuart Gerson, Asst. Atty. Gen., to Wendell L. Willkie II, Gen. Coun. of the Dep't of Commerce, at 16 (July 9, 1991) (Exh. 1 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)) ("Questioning of Bureau officials as to the statistical feasibility of adjusting population counts indicates congressional endorsement of Bureau efforts to develop sufficient technical expertise to carry out an adjustment. No congressional concern was expressed that Section 195 is a bar to adjustment for apportionment purposes.").

In sum, it was anachronistic for the district court to assume that Congress in 1976 could not have meant to give the Census Bureau discretion to decide whether to use sampling to make the census more accurate for apportionment purposes, or that such a change would necessarily have been perceived as momentous and controversial. That fact alone is sufficient to undermine reliance on the kinds of non-textual inferences drawn by the district court.

b. But there is also a more fundamental flaw in the district court's analysis. Even assuming, for the moment, that in 1976 Congress did not understand that it was changing the law with respect to "sampling" and apportionment, that does not mean members of Congress ever had a conscious intent to bar statistical techniques used to enhance the accuracy of the decennial enumeration. To the contrary, there is good reason to think that Congress did not believe such techniques had ever been barred. For that reason, if the Court is going to abandon textual analysis for an effort to discern what Congress really "meant," it would be curious at best to end up concluding that statistical adjustment is statutorily proscribed.

It is clear, first of all, that the "sampling" referred to by Congress when it enacted section 195 in 1957 was something quite different from statistical adjustments to improve the accuracy of an enumeration. When Congress in that year authorized "sampling" except for apportionment purposes, its purpose was to authorize the Census Bureau to use methods exemplified by the "long form," used to pose supplemental census questions to a small subset of a population randomly

selected to represent the whole. *See supra* pp. 8-9. That, of course, is the usual meaning of the term. Indeed, at that time, the sampling-based methods currently proposed for adjusting the full count census had not even been developed.

Congress's narrow understanding of the term "sampling" in 1957 is also reflected in the phrasing of the original version of section 195. Congress exempted sampling used for apportionment purposes from the new authorization of sampling, but it did not directly prohibit that practice. The probable reason for this phrasing is that Congress had no reason for concern that the Census Bureau was about to begin counting the population using "sampling" in the long-form sense -- *i.e.*, by contacting only a small percentage of homes -- because such a methodology would likely have been barred by another statute as well as the Constitution.[24/] It could not have made the same assumption if it had understood "sampling" to include adjustments aimed at increasing accuracy.[25/]

Thus, there is no reason to believe that a member of Congress, in 1957, would have understood that section 195 had any prohibitory effect on statistical techniques that, instead of replacing a "headcount," could be used to improve its accuracy. Moreover, it is certainly possible the members had the same narrow understanding of the term "sampling" in 1976, when

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24/ Until 1964, 13 U.S.C. § 25 required that enumerators visit each home included in the census. That requirement would have been inconsistent with a methodology extrapolating counts from visits to, for example, one home in six. Because of the likely inaccuracy of that methodology, moreover, it would have been highly questionable as a constitutional matter. *See* pp. 38-39 *infra* (the essence of the "actual enumeration" requirement is that the method must be reasonably calculated to produce an accurate count).

25/ Statistical adjustments would not have violated 13 U.S.C. § 25, because they would have occurred in conjunction with visits by enumerators to each household. As we show *infra*, statistical adjustments are also permitted by the Constitution.

they amended sections 141 and 195. After all, by that time, there had been two more censuses using "imputation," without a hint of protest from Congress, and in 1970 the Census Bureau had used more extensive sampling-based adjustment techniques and received the approval of the House committee responsible for census oversight. It follows that even if Congress believed that the 1976 Amendments left in place the prior law with respect to "sampling" and apportionment, it might well also have believed that the amended Act allowed statistical adjustments for apportionment purposes.

There is a variety of circumstantial evidence supporting this view. First, as noted, even as the 1976 Amendments were pending, the House held hearings on the undercount, in which key members pressed the Census Bureau to complete development of statistical techniques to adjust the enumeration to eliminate the undercount. But even though some of these techniques were described as using sampling,[26/] no witness or member made reference to the existing or proposed statutory provisions addressing "sampling."[27/]

A year later, some of these same members of the House most involved in census issues introduced legislation to *require* use of statistical techniques to correct for the undercount.[28/] But

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26/ *See supra*, n. 22.

27/ The 1976 Amendments, as originally proposed in 1975, had provided for a mid-decade "sample survey," which was understood to involve contacts to a small percentage of the population. *See Proposals for a Mid-Decade Census: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 1-5, 35 (1975). Thus, Congress was still using the term in the "long form" sense as of 1975.

28/ H.R. 8871, 95th Cong. § 144 at 137 (1977) (introduced on August 7, 1997 by Cong. William Lehman and Patricia Schroeder), *reprinted in The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th

that bill, which never became law, included no provision amending section 195 to accommodate this change. In the meantime, the Census Bureau proceeded with development of techniques for adjusting the decennial enumeration, some of which were sampling-based, and experimented with such adjustment techniques during the 1980 census. *See Cuomo v. Baldrige*, 674 F. Supp. 1089, 1095-1103 (S.D.N.Y. 1987) (describing these methodologies in detail).[29/]

As this discussion suggests, it is always perilous to interpret a statute based on assumptions about how a long-departed Congress would have felt about various interpretations, in part because it is so difficult to be sure that one is seeing the world the way members would have seen it at the time of passage. The only sure bet is to adopt the best reading of the words

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Cong., at 137 (1977); H.R. 10386, 95th Cong. § 143 (1977) (introduced on December 15, 1977 by Cong. Lehman, Schroeder, Solarz, and Howard, all of whom served on the Subcommittee on Census and Population). It is perhaps noteworthy, in view of the district court's emphasis on silence in the legislative history, that there was very little mention in the hearings on H.R. 8871 of the proposed requirement that the Census Bureau develop and implement methods for correcting its data to reflect the undercount.

29/ In 1980, two courts and the Office of Legal Counsel concluded that the term "sampling" in section 195 does *not* encompass statistical adjustment of a full count. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980), *rev'd on other grounds*, 653 F.2d 732 (2d Cir. 1981); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); Memorandum from John Harmon, Asst. Atty. Gen. to Alice Daniel (Sept. 25, 1980) (Exh. 6 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)) (emphasis added). Two later OLC memoranda continued to take the position that statistical adjustment of the decennial census figures used for apportionment is not statutorily barred. *See* Letter from Stuart Gerson, Asst. Atty. Gen., to Wendell L. Willkie II, Gen. Coun. of the Dept. of Commerce, at 8-9 (July 9, 1991) (Exh. 1 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)); Memorandum from Walter Dellinger, Asst. Atty. Gen., to the Solicitor General, at 12 (Oct. 7, 1994) (Exh. 7 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)).

Congress used, and let Congress to fix the problem if it disagrees. And it would be particularly ironic to depart from that method in *this* case, in the manner urged by the House, for several reasons.

First, the House is not consistent in its methodology. It asks the Court to look beyond the plain language of the current Act, on the theory that Congress could not have really "meant" to enact what plainly is the best interpretation of that language. In other words, it says that the change of meaning brought about by the 1976 Amendments was inadvertent and should not be given effect. But, in arguing, in essence, that the 1957 version of the law should be given effect, the House simultaneously relies on a definition of the term "sampling" that goes beyond what Congress "meant" when it passed section 195 in 1957. That broader definition may be consistent with plain meaning, but the application of section 195 to bar statistical adjustment of a full enumeration (and not merely surveys in the tradition of the long form) was surely unanticipated in 1957 -- and in 1976 as well.

The fact is that neither the House nor the district court -- while relying on the paucity of legislative history supporting our view of the statute -- has pointed to a shred of legislative history suggesting that Congress ever affirmatively intended to bar adjustments. The House's argument thus amounts to little more than picking and choosing when to rely on plain meaning and when to abandon it, depending on which method will serve the goal of preventing the Census Bureau from more accurately counting the American people.

But the House is the party with the least standing to ask this Court to abandon its commitment to interpretation based on plain meaning in favor of inferences about underlying congressional intent. Congress, after all, is in the midst of an ongoing debate about the Census and sampling, and could clarify the law at any time. The House leadership brought this

lawsuit in the hope that it can achieve its desired political result without having to enact a new law. This Court should not go out on a methodological limb to save the legislative branch from having to bear that burden.

II. The Constitution Does Not Restrict the Methods That Can Be Used To Enumerate the Population for Purposes of Apportionment, but Requires Only a Reasonable Relation to Achieving Equal Representation for Equal Numbers of People.

The House contended in the district court that the constitutional requirement of an "actual Enumeration" in Article I, Section 2 precludes the Census Bureau from using statistical sampling to produce counts used for apportionment, even if those counts will be *more* accurate. In the House's view a traditional count that misses 10%, 30% or even more of a state's population is more of an actual Enumeration of that population than an entirely accurate count based on another method. But the House's contention is belied by both the language and structure of Article I, which reflect the fundamental constitutional purpose of the census: to provide the population data necessary to ensure "'equal representation for equal numbers of people.'" *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)); *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). Indeed, when this Court evaluated in *Wisconsin* whether the Secretary's failure to adjust the census bore a "reasonable relationship to the accomplishment of an actual enumeration of the population," 517 U.S. at 20, it was evaluating whether the decision bore a reasonable relationship to accuracy, *id.* at 20-24, not whether the decision bore a reasonable relationship to use of a "headcount."

A. The Language and Structure of Article I, Section 2 Demonstrate that the Census Bureau's Planned Methodology is Constitutional.

The Framers used the phrase "actual Enumeration" in accord with its ordinary meaning to describe any accurate method of ascertaining population rather than a particular method. At the time the Constitution was written, the meaning of "enumeration" was "[t]he action of ascertaining the number of something; *esp.* the taking a census of population." 5 *Oxford English Dictionary* 311 (2d ed. 1989); *see also, e.g.*, William Perry, *The Royal Standard English Dictionary*. (Worcester, MA 4th ed. 1796) (defining enumeration as "a numbering or counting over" and defining enumerate as "to number"); John Elliott, *A Selected, Pronouncing and Accented Dictionary* (Suffield, Ct., Gray for Cooke, 1800) (defining "enumerate" as "to number.").[30/] Similarly, "actual" meant "[i]n action or existence at the time; present, current," as well as "[e]xisting in act or fact." 1 *Oxford English Dictionary* 132 (2d ed. 1989); *see also, e.g.*, Perry, *supra* (defining "actual" as "real, in act"). Thus, an "actual Enumeration" of the population is simply the action of ascertaining the number of people that exists in fact at the present time. *See Carey v. Klutznick*, 508 F. Supp. at 414 (consulting dictionary definitions and concluding that language of Article I, Section 2 "indicates an intent that apportionment be based on a census that most accurately reflects the true population of each state").

The Framers' intent is made even plainer by the close link between this phrase and a second component of Section 2, the directive that apportionment be based on the states' respective numbers:

30/ Conversely, "census" has long meant "[a]n official enumeration of the population of a country or district, with various statistics relating to them." 2 *Oxford English Dictionary* (1933).

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [i.e., Congress] shall by Law direct.

U.S. Const. art. I, § 2, cl. 3. The requirement that Representatives be apportioned among the states "according to their respective Numbers," clearly presumes that apportionment will be based on the *actual number* of people in each state, not on a fictional number derived from a specific methodology that is more inaccurate than it needs to be.[31/] The subsequent requirement that "[t]he actual Enumeration" shall occur at specified times is focused on the timing of gathering those population numbers, not the method for doing so. As the subject of that sentence, the phrase "[t]he actual Enumeration" clearly refers back to "their respective Numbers" and simply

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31/ Congress must, therefore, choose a census methodology that accurately assesses those numbers. Although this Court has been loath to intervene in Congress's decision as to how to conduct that assessment because accuracy does not provide a rigid measure for *courts* to determine whether the census satisfies constitutional norms, *see, e.g.*, *Wisconsin*, 517 U.S. at 14, 18, there is no doubt that Congress has a duty accurately to assess those numbers and that Congress's choice of a methodology that does not at least bear "a reasonable relationship" to an accurate assessment would exceed the scope of the deference due to it. *See, e.g.*, *id.* at 20; *Montana*, 503 U.S. at 464. Indeed, the Constitution embodies a preferences for distributive accuracy. *Wisconsin*, 517 U.S. at 20. Yet under the House's interpretation, Congress would be required to use a headcount even if current demographic trends eventually result in a situation where a headcount is entirely inaccurate and does not at all bear a reasonable relationship to an accurate assessment. Thus, the House's view potentially brings the "actual Enumeration" requirement into direct conflict with the "respective Numbers" requirement even though the two provisions are intended to operate symbiotically.

means the actual process of gathering these numbers.[32/] The modifier "actual" indicates that the apportionment must be based on a process showing the states' *real* populations, or actual numbers, not on guesswork or conjecture about what those populations are.

The constitutional text further emphasizes the wide latitude Congress has in choosing an accurate method of ascertaining respective population numbers, by prescribing that the actual Enumeration shall occur "*in such Manner as they [i.e., Congress] shall by Law direct.*" As this Court has explained, "[t]he text of the Constitution vests Congress with *virtually unlimited discretion* in conducting the decennial 'actual Enumeration, . . . [and] there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.'" *Wisconsin*, 517 U.S. at 19 (emphasis added) (footnotes omitted).[33/] It follows that it is wholly implausible to suggest that Congress simultaneously used the phrase "actual Enumeration" to mandate a particular method.

This reading is further confirmed by the remainder of Article I, Section 2, which effected an initial apportionment of Congress. Because the Constitution did not require an "actual Enumeration" of the population to be made until three years after Congress's first meeting, Section 2 provided that "until such enumeration shall be made, the State of New Hampshire

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32/ The reference-back is made plain by the use of the definite article ("*The* actual Enumeration"), rather than the indefinite article, which would be expected if "actual Enumeration" had no referent earlier in the text of Section 2 itself.

33/ The House's claim that the text conveys only the discretion to choose different methods of conducting a headcount would confine Congress's discretion to a very narrow sphere. Such a reading cannot be reconciled with the sweeping language of the text which emphasizes the Framers' intent that Congress's discretion be broad.

shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five," etc. U.S. Const. art. I, § 2, cl. 3. This interim assignment of the number of Representatives was based on conjecture as to states' likely population growth and wealth, on political compromise between different states, as well as on conjecture as to states' current populations, which were imperfectly known. 1 Farrand at 559-70. There was not even an attempt to use "principles or calculation" to estimate accurate numbers from available data and thus the inital apportionment did not "appear to correspond with any rule of numbers," *id.* at 559 (Sherman). The Framers recognized that the initial apportionment was "little more than a guess," id. at 560 (Morris), or a "conjectural ratio," *id.* at 578 (Mason). Thus, when they chose to base subsequent apportionments on an "actual Enumeration" of the states' population, what they rejected was apportionment based on a conglomeration of factors that were quantified through pure guesswork. The contrast with the initial apportionment mechanism makes clear that the criterion of an "actual Enumeration" is its accuracy and reliability as a measure of population, not the method used.

B. The Framers' Debates and Early History of the Census Demonstrate that the Census Bureau's Planned Methodology is Constitutional.

The Framers' use of the term actual Enumeration to prescribe an accurate numbering of the population is evident not only from the constitutional text, but also from the Framers' debates at the Constitutional Convention and other contemporaneous records. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court carefully canvassed these sources to determine the meaning of Article I, Section 2 and concluded that it requires congressional districts within a state to be drawn so that each has essentially the same population as the others. In reaching this conclusion, the Court noted that under the Great

Compromise reached by the Framers, the interests of large and small states were reconciled by giving each state equal representation in the Senate, while apportioning representation in the House of Representatives among the states "according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3; *Wesberry*, 376 U.S. at 12-13. Thus, "equal representation in the House for equal numbers of people" is the core "principle solemnly embodied in the Great Compromise." *Id.* at 14.

The Framers adopted the requirement of an actual Enumeration every ten years and the requirement of apportionment based on the states' "respective numbers" in order to fulfill this core purpose. As *Wesberry* explained:

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.

Id. at 13-14 (footnotes omitted); *see also id.* at 14-18. As *The Federalist* explained, "Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are . . . to readjust . . . the apportionment of representatives to the number of inhabitants . . . [and] to augment the number of representatives at the same period." *The Federalist No. 58*, at 356 (Madison) (Clinton Rossiter ed. 1961).

Given the Framers' decision to base apportionment "solely" on the "number of inhabitants," it makes little sense to conclude

that they forbade use of the method best designed to provide accurate information about the "number of inhabitants" in each state. As one court observed, "[i]t may be that today an actual headcount cannot hope to be an accurate reflection of either the size or distribution of the Nation's population. If so, it is inconceivable that the Constitution would require the continued use of a headcount in counting the population." *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *see also City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761, 767 (E.D.N.Y. 1990) ("It is no longer novel or, in any sense, new law to declare that statistical adjustment of the decennial census is both legal and constitutional.").

The House bases its interpretation on a secondary purpose that it attempts to extract from the Framer's debates -- that of preventing political manipulation by mandating the use of a headcount even if it is less accurate than competing methods. But there is not a shred of evidence to support this claim. The political manipulation about which the Framers *were* concerned was the problem of "rotten boroughs," which results when places having representation in a legislature refuse to relinquish power by reapportioning as population shifts elsewhere. *See* 1 Farrand at 584 (Madison). They therefore advocated "fixing *numbers* for the perpetual standard of Representation," *id.* at 585 (Madison, emphasis added), because this "permanent & precise standard" would compel reapportionment as population shifted, *id.* at 578 (Mason), and in this respect "t[ie] the[] hands" of future Congresses, *id.* at 580 (Randolph). Obviously, to the extent that statistical methods are more accurate than an uncorrected "headcount," sampling furthers the Framers' goal of requiring reapportionment according to the principle of equal representation for equal numbers of people.

Moreover, a headcount is not less politically manipulable, and may be more politically manipulable, than statistical

sampling. In a headcount, decisions as to the resources to devote to counting particular areas -- or even whether to count particular individuals, *see supra* n.1 -- can be easily manipulated to affect results, and a headcount, unlike statistical sampling, does not have known error rates. *See supra* p. 8.

In any event, the House's claim that the Framers were afraid to give Congress discretion in choosing a census methodology is entirely inconsistent with prior holdings of this Court emphasizing that the exercise of discretion by Congress (or its delegates) may occur even after the raw census numbers are in and the effect on apportionment is known with certainty. *See Wisconsin*, 517 U.S. 1 (1996) (upholding Secretary's after-the-fact decision not to adjust 1990 "headcount"); *Franklin*, 505 U.S. at 796-802 (holding that even after Secretary of Commerce reports census results to President, President may make policy judgments -- such as whether overseas federal employees should be included in census totals -- that can change those results); *Montana*, 503 U.S. at 463-66 (holding that Congress may select among several apportionment formulas as long as the chosen formula is "open to . . . change at any time"). Indeed, for most of the Nation's history, Congress did not select the precise formula to be used in apportioning congressional seats among the states until it had the census results before it and could calculate precisely how each of the various formulas would affect the number of seats that each state would receive. *See id.* at 448-53. *See generally* Anderson, *American Census*, *supra*. It would be odd indeed if the Framers had sought to prevent political manipulation by severely constraining Congress's discretion in the conduct of the census, but then let Congress freely choose among several apportionment formulas once the census results were in.

The emergence of the phrase "actual Enumeration" during the Philadelphia Convention underscores that the imposition of such a severe constraint is not what Congress intended. As

Wesberry observed, Randolph first proposed that a periodic "census" be taken so that reapportionment of the House (and taxation) could be based on the states' actual populations. *See supra*. Later, when the Committee of Detail reduced the various resolutions passed by the Convention into the first draft of the Constitution, its draft expressed the requirement of a periodic census in language simply stating that "[the] number [of inhabitants] shall . . . be taken in such manner as the . . . Legislature shall direct." 2 Farrand at 182-83 (report of Committee of Detail).[34/] This language plainly gave Congress complete discretion in choosing the method by which the "number" of inhabitants "shall . . . be taken," and it remained intact throughout the remaining debates at the Convention. The Committee of Style then reworked the entire draft Constitution. In doing so, it replaced the language of the original draft ("which number shall . . . be taken") with the phrase "actual enumeration." *id.* at 590 (report of Committee of Style). Finally, for two days after the Committee of Style made its report to the whole Convention, that body reviewed the Committee's proposal paragraph-by-paragraph to ensure that the reworking did not alter the meaning of the language to which the Convention had earlier agreed. *See id.* at 605, 610, 612. Not a single delegate suggested that the phrase "actual enumeration" meant something different from the previously approved language directing that the "number [of inhabitants] shall . . . be taken."

34/ "The proportions of direct taxation shall be regulated by the whole *number of* white and other free *citizens and inhabitants*, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) *which number shall*, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, *be taken in such manner as the said Legislature shall direct*." *Id.* (emphasis added).

Finally, although the House contends that its reading is supported by the history of the early censuses, the opposite is actually true. The House asserts that an actual Enumeration requires a headcount, because the meaning of this phrase is to "reckon up singly" or "to count[] by naming each particular." Plaintiff's Motion for Summ. J. at 48. But if the House's definition is correct, then not a single census, from 1790 to 1990, has been constitutional. Censuses from 1790 through 1830 relied on the family as the unit of counting. The head of the family was asked how many individuals were in the family and this number was recorded, but the names of individual family members were not recorded. *See, e.g.*, Anderson, *American Census*, at 13; Act of March 1, 1790, ch. 2, 1 Stat. 101-02. Thus, population numbers were not arrived at by "reckoning up singly" and "naming each particular" but rather family by family. Moreover, when a member of the household could not be found, census-takers historically relied on information from neighbors, *see, e.g.*, Act of March 3, 1879, ch. 195, 20 Stat. 473, 475, *Decennial Census* at 44, or, since 1940, have statistically imputed demographic characteristics to the household based on the characteristics of neighbors. *See supra* p. 5. Given that census data have always been derived from reports from third parties, the House's claim that the decennial census has always been a "headcount" becomes even more difficult to maintain. At what point does reliance on third-party information no longer constitute a "headcount"? Finally, of course, because no census has ever been entirely accurate, there has never been a census in which all individuals have been "reckon[ed] up;" every census has made assumptions about the whole population based on a "sample" of that population. The fact that early Congresses required use of a census methodology that did not meet the House's definition of "actual

Enumeration" strongly suggests that this definition is not correct.[35/]

In sum, there is not one iota of evidence suggesting that the Census Bureau's prior method is an "actual Enumeration" of the population and that any other method is not.[36/] This Court should not read a requirement of *inaccuracy* into the

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35/ Inferences drawn from early censuses only run in one direction. Contrary to the claims of the House, the fact that early Congresses adopted a particular method of taking the census suggests that they thought that this method was constitutional but hardly suggests that they thought that other methods were not constitutional. Congress's decision to exercise its discretionary power in one way does not *exclude* the power to exercise that discretion in some other way. This Court has, for example, upheld the Secretary's 1990 decision to *depart* from longstanding practice by including overseas federal employees in the census results for their home states. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

36/ The House also argued below that sampling is barred by the Fourteenth Amendment, which requires that representatives be apportioned according to the states' "respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. But in this context, the verb count clearly means "[t]o include in the reckoning; to reckon in." 2 Oxford English Dictionary 1055-56 (1933). Thus, the Amendment specifies that the numbers that serve as the basis of apportionment are to include all persons. This reading is confirmed by the manifest purpose of the "whole persons" clause of the Fourteenth Amendment, which was to amend the "three fifths" clause of Article I, Section 2, and thus to ensure that each person's existence is to be given equal weight when seats in Congress are apportioned. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). Indeed, it would be ironic in the extreme if the Amendment, which was intended to give freed slaves equal weight when apportioning the House of Representatives, should now be read to require a method of enumeration that indisputably underrepresents African-Americans, depriving them of an equal voice in the halls of Congress.

Constitution, and should not allow the House's weak constitutional argument to skew its statutory analysis.[37/]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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37/ Even if the term "actual Enumeration" somehow required a headcount, the Census Bureau's plans would be constitutional, because the Census Bureau intends to conduct such a headcount by contacting every known household. Nothing in the text requires the unadjusted results of "the actual Enumeration" to be used as the sole basis for apportionment. Indeed, the text requires that apportionment be based on the "respective Numbers" in the different states. Thus, the Census Bureau's plan to statistically adjust the results of the headcount to more accurately reflect the "respective Numbers" of the states is a perfectly appropriate basis from which to apportion representatives regardless of the meaning of actual Enumeration.